RECORD
AND
BRIEFS

No. 16-86

IN THE

Supreme Court of the United States

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,

Petitioners,

v.

LAURENCE KAPLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

KAREN L. HANDORF
Counsel of Record
MICHELLE C. YAU
COHEN MILSTEIN
SELLERS & TOLL PLLC
1100 New York Ave. NW,
Suite 500 East
Washington, DC 20005
(202) 408-4600
khandorf@cohenmilstein.com

JAMES A. FELDMAN
5335 Wisconsin Ave. NW,
Suite 440
Washington, DC 20015

LYNN LINCOLN SARKO
MATTHEW GEREND
KELLER ROHRBACK L.L.P.
1201 Third Ave.,
Suite 3200
Seattle, WA 98101
(206) 623-1900

RON KILGARD
KELLER ROHRBACK L.L.P.
3101 North Central Ave.,
Suite 1400
Phoenix, AZ 85012
(602) 248-0088

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") provides significant protections for employees' pensions, but it includes an exemption for a "church plan." 29 U.S.C. §1003(b)(2). A "church plan" is a pension or welfare plan "established and maintained ... by a church," *id.* §1002(33)(A), which "includes" a plan "maintained" by a pension board or similar administrative organization controlled by or associated with a church, *id.* §1002(33)(C)(i). All three courts of appeals to consider the issue have concluded without dissent that the exemption does not extend to plans that were not "established ... by" a church, and that therefore a pension plan established by a large health care provider like the one involved here is not exempt from ERISA.

The question presented is:

Whether a pension plan for employees of a large health-care provider is exempt from—and therefore its participants are unprotected by—ERISA, even though the plan concededly was not "established" by a church.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 8

I. THE ONLY THREE COURTS OF APPEALS TO ADDRESS THE ISSUE HAVE AGREED, WITHOUT DISSENT, THAT A CHURCH PLAN MUST BE ESTABLISHED BY A CHURCH 9

A. The Third, Seventh, and Ninth Circuits Have All Rejected Petitioners' Arguments Without Difficulty 9

B. The Question Presented Here Was Not Before the Fourth and Eighth Circuits 11

II. GRANTING REVIEW WOULD PUT AT RISK SPHS'S 2,800 EMPLOYEES AND IS UNWARRANTED AT THIS INTERLOCUTORY STAGE 12

A. There Is No "Settled Law" that Supports Petitioners' Interpretation 12

B. Further Delay of this Litigation Would Impose Severe Costs on SPHS's Employees 15

TABLE OF CONTENTS
(continued)

C. Petitioners' Exaggerated Claims of Injury from Allowing this Litigation to Continue Are Without Merit 17

III. PETITIONERS' PLAN IS NOT A "CHURCH PLAN" 22

A. The Text and Legislative History Both Make Clear that a Church Plan Must Be "Established" by a Church 22

B. The Only Constitutional Problem in this Case Would Arise if Petitioners' View of the Statute Prevailed 24

IV. THIS CASE IS IN ANY EVENT A POOR VEHICLE 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES:

Am. Guidance Found., Inc. v. United States,
490 F. Supp. 304 (D.D.C. 1980) 26

Christensen v. Harris County,
529 U.S. 576 (2000) 13

Chronister v. Baptist Health,
442 F.3d 648 (8th Cir. 2006) 11, 30

Coleman-Edwards v. Simpson,
330 F. App'x 218 (2d Cir. 2009) 15

Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-day Saints v. Amos,
483 U.S. 327 (1987) 26

Cutter v. Wilkinson,
544 U.S. 709 (2005) 27

Egelhoff v. Egelhoff ex rel. Breiner,
532 U.S. 141 (2001) 14

Estate of Thornton v. Caldor,
472 U.S. 703 (1985) 26

Found. of Human Understanding v. United States,
614 F.3d 1383 (Fed. Cir. 2010) 25

Gobeille v. Liberty Mut. Ins. Co.,
136 S. Ct. 936 (2016) 14

Board of Education v. Grumet,
512 U.S. 687 (1994) 26

TABLE OF AUTHORITIES
(continued)

United States v. Lee,
455 U.S. 252 (1982).....27

Lockheed Corp. v. Spink,
517 U.S. 882 (1996).....1

Lown v. Continental Casualty Co.,
238 F.3d 543 (4th Cir. 2001).....11, 30

Nachman Corp. v. PBGC,
446 U.S. 359 (1980).....15

Rollins v. Dignity Health,
2016 WL 3997259 (9th Cir. 2016) 10, 13, 25

Rollins v. Dignity Health,
59 F. Supp. 3d 965 (N.D. Cal. 2014).....25

Stapleton v. Advocate Health Care Network,
817 F.3d 517 (7th Cir. 2016).....*passim*

STATUTES:

26 U.S.C. §414(e).....4

26 U.S.C. §501(r) 20

26 U.S.C. §6110(k)(3) 13

28 U.S.C. §1292(b).....5

29 U.S.C. §1001(a).....1, 15

29 U.S.C. §1002(33) (1974) 2, 3

29 U.S.C. §1002(33).....*passim*

29 U.S.C. §1003(b)(2) 1

29 U.S.C. §1104(a)(1) 21

29 U.S.C. §1132(c)(3).....21

TABLE OF AUTHORITIES
(continued)

42 U.S.C. §1395dd 20

N.J. Stat. Ann. §26:2H-12.52 20

N.J. Stat. Ann. §26:2H-18.58 20

N.J. Stat. Ann. §26:2H-18.64 20

LEGISLATIVE HISTORY:

124 Cong. Rec. 12,107 (1978) 24

S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889 ..... 2, 26

OTHER AUTHORITIES:

29 C.F.R. §2509.2015-01 (2015) 22

80 Fed. Reg. 65135-01 (Oct. 26, 2015) 22

IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (Nov. 2, 1982) 12, 13

IRS Rev. Rul. 69-545, 1969 WL 19168 (Jan. 1, 1969) 20

N.J. Admin. Code §10:52-11.14 20

Rev. Proc. 2016-1, §2.01, 2016 WL 20933 (Jan. 4, 2016) 13

Pension Rights Center, *91 church plan PBGC premium refunds in the years 1992 to 1998 (and 2013)* 18

STATEMENT

Petitioner Saint Peter's Healthcare System (SPHS) is a nonprofit healthcare entity that operates a hospital and other medical facilities and employs over 2,800 people. Pet. App. 6a. SPHS is not a church. *Id.* The petition represents petitioners' attempt—in the face of consistent rulings (without dissent) by the only three courts of appeals to address the issue—to exempt the SPHS pension plan from ERISA on the ground that it is a "church plan." 29 U.S.C. §1003(b)(2). This case presents the same question as *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), *petition for cert. filed*, July 15, 2016 (No. 16-74). ERISA's definition of a "church plan" makes clear that plans like SPHS's—which were not established by any church—are not exempt, as the court below and each of the other courts of appeals that have ruled on the issue have concluded. The petition should be denied.

1. ERISA was designed to remedy "the lack of employee information and adequate safeguards" and the "inadequacy of current minimum standards" for pension (and welfare) plans. 29 U.S.C. §1001(a). ERISA "seek[s] to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

ERISA includes an exemption for "church plan[s]." 29 U.S.C. §1003(b)(2). "The term 'church plan' means a plan established and maintained for its employees by a church or by a convention or association of

churches[.]"[1] 29 U.S.C. §1002(33)(A) (1974). The purpose of that exemption was to avoid "examinations of books and records" that "might be regarded as an unjustified invasion of the confidential relationship ... with regard to churches and their religious activities." S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. The version originally enacted in 1974 temporarily (until 1982) permitted pre-existing plans "established and maintained by a church" to cover employees of church-affiliated agencies. 29 U.S.C. §1002(33)(C) (1974).

In 1980, Congress amended the church plan exemption to address two concerns. First, churches wanted continuing authority, past 1982, to include employees of church-affiliated agencies in their plans. Second, the requirement that church plans be "maintained" by a church was of concern to certain churches that used distinct financial services organizations (often called "pension boards") to maintain and administer their pension plans. Pet. App. 18a-19a.

To address the 1982 sunset provision, Congress amended the definition of "employee" under the church plan definition, such that an "employee of a church ... includes ... an employee of an organization ... which is controlled by or associated with a church." 29 U.S.C. §1002(33)(C)(ii)(II); *see also id.* §1002(33)(C)(iii) (church shall be "deemed" employer of such "employee[s]"). Because a "church plan" was

---

[1] "Church," as used herein, refers to any church or convention or association of churches. It also refers to a synagogue, mosque, or other house of worship.

still defined as "a plan established and maintained ... *for its employees* ... by a church," *id.* §1002(33)(A) (emphasis added), the amendments allowed churches to include in their benefit plans not only their own employees, but also employees of certain church-associated organizations.

To address churches that maintained their plans through separate organizations, i.e., pension boards, Congress enacted the provision at issue here:

> A plan established and maintained for its employees ... by a church or by a convention or association of churches includes a plan maintained by an organization, ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

Id. §1002(33)(C)(i). A church could now retain the exemption even if it turned over maintenance of its plan to an organization primarily engaged in plan management and controlled by or associated with the church.

2. SPHS provides retirement benefits for its more than 2,800 employees through the defined-benefit Saint Peter's Healthcare System Retirement Plan (the "Plan"). SPHS established the Plan in 1974, and from then until at least 2006 operated the plan subject to ERISA and so informed its employees. Pet. App. 6a. In 2006, SPHS applied to the IRS seeking a private letter ruling regarding whether the Plan met

the definition of a "church plan" for purposes of a parallel provision of the Internal Revenue Code, 26 U.S.C. §414(e). Pet. App. 7a. The IRS issued the requested private letter ruling in 2013, after this case was commenced. Pet. App. 32a. Meanwhile, in 2010, SPHS closed the Plan to new employees and announced that new employees would instead participate in a new, defined-contribution plan that would not be operated as a church plan but would instead be subject to ERISA. Compl. ¶¶61-62, C.A. App. A62.

Respondent is a former employee of SPHS with claims to benefits under the Plan. He brought this action on behalf of himself and other participants and beneficiaries in the Plan, against SPHS and the other petitioners, who are involved in the administration of the Plan. The complaint alleges that petitioners violated ERISA by, *inter alia*, failing to follow ERISA's reporting and disclosure requirements and failing to insure and adequately fund the Plan. Pet. App. 7a, 33a. Respondent seeks a declaration that the Plan is not a church plan under ERISA, an injunction requiring SPHS to reform the Plan to comply with ERISA and otherwise to satisfy ERISA's requirements, and civil penalties and damages. Compl. 42-44, C.A. App. A88-A90.

Respondent alleged that, because the Plan was not "established" by a church, it does not qualify as an exempt church plan. That is the issue decided by the court of appeals, in respondent's favor. Respondent also alleges two alternative, and independent, reasons why the Plan does not qualify as a "church plan" under the statute. *See infra* pp.28-30; Pet. App. 17a n.8. Finally, even if the Plan satisfied the statutory

requirements, it would nonetheless be subject to ERISA because such a bald religious preference for a religiously-affiliated institution, unrelated to any need to accommodate religious faith or practice, would violate the Establishment Clause. *See infra* pp. 26-27; Pet. App. 33a.

3.a. The district court denied petitioners' motion to dismiss the complaint. The court "conclude[d] that Congress was cautious in crafting the definition of a church plan and therefore the definition means what it says—that a church plan must, from the outset, be established by a church and can be maintained by an organizations controlled by or associated with a church." Pet. App. 40a. The court explained that "although the church plan definition, as defined in subsection A, is expanded by subsection C to include plans *maintained* by a tax-exempt organization, it nevertheless requires that the plan be ***established*** by a church or a convention or association of churches." Pet. App. 39a. That interpretation "provides a common sense reading of the statute based on its plain text." Pet. App. 46a.

b. The district court certified the following question for interlocutory appeal under 28 U.S.C. §1292(b):

> Whether an organization, a civil law corporation or otherwise, can both establish and maintain a "church plan," as defined in the Employee Retirement Income Security Act, 29 U.S.C. §1002(33), if such organization is controlled by or associated with a church or a convention or association of churches?

Pet. App. 65a.

4.a. The court of appeals affirmed, without dissent. Pet. App. 1a-26a. The court concluded that "the statute has a plain meaning, and that meaning sets the result." Pet. App. 13a. The court explained that "[p]rior to 1980, a plan needed to be established *and* maintained by a church" to qualify as a church plan. Pet. App. 13a. "The 1980 amendments provided an alternative way of meeting the maintenance requirement by allowing plans maintained by church agencies to fall within the exemption[,] [b]ut they did not do away with the requirement that a church establish a plan in the first instance." Pet. App. 13a.

The court analogized the statute here to a hypothetical statute providing that "any person who is disabled and a veteran is entitled to free insurance." Pet. App. 14a. The court postulated a later amendment providing "that, for purposes of the provision, 'a person who is disabled and a veteran includes a person who served in the National Guard.'" Pet. App. 14a. As the court of appeals summarized, petitioners' own counsel conceded that, under such a statute, "a person who served in the National Guard but is not disabled" does not "qualif[y] to collect free insurance ... because only the second of the two conditions was satisfied." Pet. App. 14a; *see infra* pp. 23-24. That correct concession "only serves to highlight the fatal flaw in the construction of ERISA advanced by [petitioners]." Pet. App. 14a.

The court added that petitioners' construction also would make the "establishment requirement in

[§33(A)] ... superfluous[,]" "because any plan, regardless of who established it, would be eligible for an exemption as long as it is maintained by an entity that meets the requirements of [§33(C)(i)]." Pet. App. 14a. The court noted that "the purpose of [§33(C)(i)] was not to deal with a plan established and maintained by a church agency but rather to account for a plan established by a church and maintained by its pension board (*i.e.*, a church agency)." Pet. App. 15a n.7.

The court held that, although it "need not decide the issue," it had "substantial reservations over whether SPHS can even maintain an exempt plan." Pet. App. 17a n.8. The court explained that SPHS appears not to meet the subsection 33(C)(i) "principal purpose" requirement because the "principal purpose [of SPHS] is the provision of healthcare and not the administration or funding of the retirement plan." Pet. App. 17a-18a n.8.

The court went on to find that, "[e]ven if the statute were ambiguous and the legislative history bore on our analysis, the result would be the same." Pet. App. 18a. The court's extensive examination of the legislative history "reinforce[d]" the "conclusion that the exemption is only available to plans established by churches," because it "demonstrates that the purposes of the 1980 amendments were to account for plans established by churches but maintained by church agencies ... and to extend the sunset provision set to take effect at the end of 1982." Pet. App. 18a-19a. The court noted that SPHS "has not pointed to a single statement showing that Congress, in addition to being concerned about the sunset provision and plans maintained by pension boards (*i.e.*, church

agencies), was also focused on plans *established* by those agencies." Pet. App. 22a.

Finally, the court rejected petitioners' argument that non-precedential IRS letter rulings or hypothesized congressional acquiescence in those rulings (of which there was no reason to believe Congress knew) should alter its conclusion. Pet. App. 22a-24a. The court easily disposed of petitioners' argument that they were constitutionally *entitled* to a broadened church-plan exemption. The court noted that petitioners' argument "that Congress cannot validly distinguish between churches and church agencies" is "unpersuasive," because "[C]ongress regularly applies provisions to churches without reference to church agencies." Pet. App. 25a (citing statutes).

b. The court denied petitioner's petition for rehearing and rehearing en banc, with no recorded dissent. Pet. App. 27a-28a.

REASONS FOR DENYING THE PETITION

This case presents the same question as the petition in *Advocate Health Care Network v. Stapleton*, No. 16-74. As discussed in the Brief in Opposition in that case (pp. 9-16), the courts of appeals have uniformly agreed that a church plan must be established by a church. They have correctly held that large health-care organizations like SPHS must provide ERISA-mandated minimum protection and insurance for their employees' pension plans, just like SPHS's secular competitors are required to do. And in this case, SPHS terminated any new participation in the plan at issue in 2010, establishing a new (and ERISA-compliant) defined contribution plan for employees

hired later. The question presented here is accordingly of dwindling importance to petitioners. Further review, especially at this interlocutory stage of this case, is unwarranted.

I. THE ONLY THREE COURTS OF APPEALS TO ADDRESS THE ISSUE HAVE AGREED, WITHOUT DISSENT, THAT A CHURCH PLAN MUST BE ESTABLISHED BY A CHURCH

As discussed in the Brief in Opposition in *Advocate* (pp. 9-16), all three courts of appeals that have addressed the issue in this case have reached the same conclusion: subsection 33(A)'s requirement that an ERISA-exempt church plan be "established" by a church was not altered by subsection 33(C)(i)'s specification that a church plan can be "maintained" by a church-affiliated organization that satisfies certain requirements. All three courts rejected the same arguments petitioners make here without dissent. The earlier decisions of two courts cited by petitioner did not address the question presented here. The question presented here remains open in those circuits. There is no conflict.

A. The Third, Seventh, and Ninth Circuits Have All Rejected Petitioners' Arguments Without Difficulty

1. The Third Circuit in this case concluded that "the statute has a plain meaning, and that meaning sets the result." Pet. App. 13a. As the court explained, "[t]he 1980 amendments provided an alternate way of meeting the maintenance requirement by allowing plans maintained by church agencies to fall within the exemption[,] [b]ut they did not do away with the

requirement that a church establish a plan in the first instance." Pet. App. 13a. The court found that the legislative history further supported its conclusion. Pet. App. 18a-22a. The court also rejected the hospital's reliance on non-precedential IRS rulings, Pet. App. 22a-23a, and held that petitioners' Religion Clause arguments were without merit, Pet. App. 24a-26a.

2. As explained in the Brief in Opposition in *Advocate* (pp. 9-11), the only two other courts to have reached the question presented expressly agreed with the Third Circuit's ruling and reasoning here. The Seventh Circuit in *Advocate* agreed that "[t]he plain language of (33)(C) merely adds an alternative meaning to one of subsection (33)(A)'s two elements—[the] 'maintain' element—but does not change the fact that a plan must still be established by a church." 817 F.3d at 523. The Ninth Circuit in *Rollins v. Dignity Health*, 2016 WL 3997259 (9th Cir. 2016), *petition for cert. filed*, Aug. 29, 2016 (No. 16-258), also agreed with each of its sister circuits that, "to qualify for the church-plan exemption ... a plan must have been established by a church *and* maintained either by a church or by a principal-purpose organization." *Id.* at *3. Like the Third Circuit, the Seventh and Ninth Circuits concluded that the legislative history supported this construction, rejected the hospitals' reliance on non-precedential IRS rulings, and held that petitioners' Religion Clause arguments were without merit.

3. In short, three courts of appeals have examined precisely the arguments that petitioners make here and rejected them. There was no dissent in any of the three courts of appeals.

B. The Question Presented Here Was Not Before the Fourth and Eighth Circuits

As explained in the Brief in Opposition in *Advocate* (pp. 11-16), petitioners mistakenly contend that the decisions of the Fourth Circuit in *Lown v. Continental Casualty Co.*, 238 F.3d 543 (4th Cir. 2001), and the Eighth Circuit in *Chronister v. Baptist Health*, 442 F.3d 648 (8th Cir. 2006), conflict with the uniform view of the Third, Seventh, and Ninth Circuits. Neither *Lown* nor *Chronister* conflicts with, or is even in any tension with, the decisions of the latter courts. Petitioners cite *no* language in *Chronister* that addressed the issue of statutory construction here, and the brief sentence they quote from *Lown* was dictum. Neither the Fourth Circuit nor the Eighth Circuit was asked to decide whether a church plan could be established by a non-church organization. Neither court engaged in any statutory analysis regarding whether a church plan must be established by a church, as both courts concluded that the plans at issue were *not* church plans because they did not satisfy *other*, independent requirements of the church plan definition.

The Fourth and Eighth Circuits therefore are not presently bound to rule one way or the other on the question presented here. Those courts are likely to have the opportunity to address the question presented here in new cases currently pending in their district courts. *See* Pet. 13-15. There is no reason to believe that, when they do so, they will deviate from the plain meaning of the statutory text and the unanimous decisions of the Third, Seventh, and Ninth Circuits.

II. GRANTING REVIEW WOULD PUT AT RISK SPHS'S 2,800 EMPLOYEES AND IS UNWARRANTED AT THIS INTERLOCUTORY STAGE

As this litigation proceeds, SPHS's 2,800 employees must endure the costs and risks of SPHS's legally inadequate pension plan, while SPHS reaps the competitive advantages in the marketplace of its ability to impose a substandard plan on its employees. No circuit has agreed with petitioners, and there is nothing else that would indicate that petitioners' argument has sufficient merit to warrant this Court's attention at this interlocutory stage.

A. There Is No "Settled Law" that Supports Petitioners' Interpretation

Petitioners argue that further review is warranted because "[i]t has been settled law for well over thirty years that pension plans maintained by otherwise qualifying church-affiliated organizations are exempt from ERISA ... , whether or not a church itself established the plan." Pet. 1. As explained in the Brief in Opposition in *Advocate* (pp. 16-20) however, "[s]ettled law" is created by decisions of courts or, at most, agency rulings that are intended to state the agency's considered view on a subject. As shown above, the law in the courts of appeals is contrary to petitioners' position, and no agency has made any precedential or reliance-worthy rulings on the subject.

1. Petitioners rely on a memorandum issued for internal agency use by the IRS's general counsel in 1982. IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (Nov. 2, 1982). As explained in the Brief in Opposition in *Advocate* (pp. 17-19), that memorandum expressly

instructs that it "is not to be relied upon or otherwise cited as precedent by taxpayers." 1983 WL 197946, at *6. Moreover, the memorandum is not entitled to deference because it was not a result of "formal adjudication or notice-and-comment rulemaking," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). As the courts of appeals have concluded, it also has no "power to persuade" because it "is based on an obvious misreading of the statutory text, and it ignores the relevant legislative history." *Dignity*, 2016 WL 3997259, at *7; *see* Pet. App. 23a; *Advocate*, 817 F.3d at 530-31. It therefore cannot be taken as "settled law," or, indeed, as "law" in any sense.

2. The same is true of later-issued private letter rulings, which also "may not be used or cited as precedent." 26 U.S.C. §6110(k)(3); *see Advocate*, Br. in Opp'n pp. 18-19 (discussing nonprecedential status and inability of private letter ruling to bind nonparties, such as a hospital's employees). SPHS itself did not even receive such a ruling until 2013, after this case was commenced. Pet. App. 7a. In any event, those letter rulings do not *analyze* the statute; they merely *restate* the statutory text before applying the conclusion of the general counsel memorandum. Recipients of private letter rulings may be entitled to rely on such letters *vis-à-vis* the IRS with respect to the tax-qualification status of their benefit plans.[2]

---

[2] *See* IRS Rev. Proc. 2016-1, §2.01, 2016 WL 20933 (Jan. 4, 2016) (a "letter ruling" is a response to a taxpayer's inquiry "about its status for tax purposes or the tax effects of its acts or transactions."); *id.* §11.01.

But petitioners cite no authority indicating that recipients of such letters—much less *other* entities—are entitled to rely on the informal, nonprecedential position of the IRS as a justification for denying plan participants the protections to which they are entitled under ERISA.

3. Petitioners' concerns regarding a lack of national uniformity ring hollow. *See* Pet. 24-25. The law *is* uniform—every circuit that has addressed this issue has reached the same result; plan sponsors have no contrary authority on which to rely if they choose to continue to treat non-church-established plans as church plans. Moreover, uniformity supports the decisions of the Third, Seventh, and Ninth Circuits; petitioners' exemption from ERISA would mean that plans like SPHS's are subject to the varying substantive and remedial laws of fifty different States. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

4. Petitioners contend that the "vast majority of benefit plans currently operated as church plans were not established by churches themselves." Pet. 17. Petitioners' carefully worded assertion merely reflects the fact that hundreds of church-associated hospital conglomerates, often at the urging of "gotcha" (Pet. 21) benefit consultants, have in recent decades exploited a misreading of ERISA to lower their costs by claiming church-plan status for plans that had been operated—correctly—as ERISA plans. *See infra* pp. 16-17. That traditional church-established plans have rarely sought IRS private letter rulings, Pet. 17-18, is not surprising, since there is no question that a plan

established by a church satisfies the statutory church-plan definition.[3]

B. Further Delay of this Litigation Would Impose Severe Costs on SPHS's Employees

1. Imposition of minimum standards on pension plans and ensuring that employees actually get the benefits promised by such plans are essential goals of ERISA. *See* 29 U.S.C. §1001(a). As explained in the Brief in Opposition in *Advocate* (p. 20-21), ERISA was enacted to redress a sadly extensive record of employees being left with little or nothing to show after years of reliance on an employer's promises of pension benefits. *See, e.g., Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980). Non-ERISA plans pose the same risks today, as unfortunately demonstrated by the failures of purported "church plans" that were operated by a number of hospital systems. The failures of those underfunded and uninsured plans deprived employees of the pensions they had been promised and for which they had worked for many years. *See Advocate*, Br. in

---

[3] This case does not present the question whether certain plans covering clergy were actually "established" by pension boards, Pet. 17-18, or whether instead, consistent with subsection 33(A), such plans were established by conventions or associations of churches with the assistance of pension boards. In petitioners' cited example, the Second Circuit explained that "[i]t is not in dispute that Concord established its health and pension plans and that Concord is a church." *Coleman-Edwards v. Simpson*, 330 F. App'x 218, 220 (2d Cir. 2009).

Opp'n p. 21 & n.6 (citing further examples). The complaint alleges underfunding and other current deficiencies in SPHS's plan.[4] Without ERISA's protections and PBGC insurance, nothing would protect SPHS's employees from substandard substantive provisions, a lack of proper reporting and disclosure, and an ultimate risk of plan failure.

2. Petitioners argue that "[i]t is hard to overstate the burden and havoc" that the court of appeals' decision would create. Pet. 2. Because the extent of petitioners' ERISA violations and the scope of necessary relief have not yet been litigated or resolved, petitioners' contention at this interlocutory stage is pure speculation. As explained in the Brief in Opposition in *Advocate* (pp. 23-24), petitioners' assertions that they would be forced to make "irreversible" changes and would incur other costs of compliance (Pet. 19) are vastly overstated. Rather, ERISA compliance would require them to operate their plans—as do their secular competitors—in accordance with the requirements that Congress deemed necessary to ensure that employees are treated fairly and their promised pensions are secure.

It is particularly ironic for petitioners in this case to claim that complying with ERISA would be "irreversible," Pet. 19, as SPHS has previously made the precise switch—from ERISA to church plan status—

---

[4] While petitioners assert that the Plan is not underfunded, Pet. 12, that contention was vigorously disputed in the courts below. *See* Pet. App. 7a & n.3, 33a. Because this case arose on a motion to dismiss, petitioners' submission must be disregarded.

that they now claim could not occur in the event the decision of the court of appeals were ever overturned. SPHS established the Plan in this case in 1974. "For more than three decades, [SPHS] operated the plan subject to ERISA and represented to its employees in plan documents and other materials that it was complying with ERISA." Pet. App. 6a. In 2006, SPHS decided to switch to church-plan status, presumably to avoid the cost of complying with ERISA. Pet. App. 6a-7a, 32a. In 2011, it informed its employees that it was converting to church-plan status. Pet. App. 32a. As explained in the Brief in Opposition in *Advocate* (pp. 23 & n.7, 24), hundreds of other plans have been reimbursed by the PBGC for previously paid premiums when, after years of operating as ERISA plans, they similarly made the "irreversible" switch to claim church-plan status.

C. Petitioners' Exaggerated Claims of Injury from Allowing this Litigation to Continue Are Without Merit

Petitioners' other arguments are without foundation.

1. Petitioners state that SPHS "is a nonprofit entity" and that "[i]n 2014, it provided $36.2 million in charitable care to the needy[.]" Pet. 21 (citing C.A. App. A341). Petitioners argue that allowing this litigation to proceed (and protecting their employees under ERISA) "would come at the expense of destitute patients in New Jersey who rely on this free care." Pet. 21.

SPHS's $36.2 million in contributions to the community is a number from 2012, not 2014.[5] That fact is significant because it appears that in 2012, SPHS—which had not yet received a private letter ruling from the IRS, *see* Pet. App. 32a—was still paying PBGC premiums and presumably operating the plan as an ERISA plan.[6] In any event, regardless of the plan's status—church plan or ERISA plan—in 2012, the figure is on a par with the contributions of its secular competitors who definitely comply with ERISA. Because petitioners' figure derives from its consolidated financial statements and because community benefit numbers in the financial statements of SPHS's competitors may be calculated differently, it is useful to compare the similar numbers provided in the annual IRS Form 990 filed by tax-exempt institutions. In

---

[5] Petitioners cite (at Pet. 21) C.A. App. A341 ¶15, which is a certification of Garrick Stoldt, VP & CFO of SPHS, dated August 12, 2013. It states that "[i]n the last calendar year, [SPHS] reported $36.2 million expended for charity care and community benefits, or 9% of its total expenses[.]" The $36.2 million amount appears in SPHS's consolidated financial statements from 2012. C.A. App. A1293.

[6] *See* Pension Rights Center, *91 church plan PBGC premium refunds in the years 1992 to 1998 (and 2013)*, http://www.pensionrights.org/sites/default/files/docs/church_plan_refunds_1992-1998_2013.pdf (including St. Peter's University Hospital's pending refund amount for year 2013, #215 on the list on p. 3).

2012, Saint Peter's University Hospital[7] reported $36.7 million in net community benefit expense on its Form 990 Schedule H, or 9.14% of its total expenses.[8] Other secular health-care providers in New Jersey devoted similar proportions of their expenses to community benefits while also providing ERISA protections to their employees. For example, the Robert Wood Johnson University Hospital's $79.3 million in net community benefit expense was 10.53% of its total 2012 expenses.[9] Hackensack University Medical Center's $106.6 million in net community benefit expense was 9.44% of its total 2012 expenses.[10] Atlantic Health System's $118.5 million of net community benefit expense was 7.87% of its total 2012 expenses.[11] Moreover, in 2014—after SPHS received its private letter ruling and presumably ceased paying PBGC premiums—Saint Peter's University Hospital re-

---

[7] SPHS is a holding company that provides healthcare services through Saint Peter's University Hospital and other subsidiaries. *See, e.g.*, C.A. App. A1287.

[8] *See* http://bit.ly/2cfysEo (Saint Peter's University Hospital 2012 Form 990 at Schedule H lines 7k(e), (f)).

[9] *See* http://bit.ly/2c9y9HT (Robert Wood Johnson University Hospital 2012 Form 990 at Schedule H lines 7k(e), (f)).

[10] *See* http://bit.ly/2coi07u (Hackensack University Medical Center 2012 Form 990 at Schedule H lines 7k(e), (f)).

[11] *See* http://bit.ly/2cKgnh7 (Atlantic Health System, Inc. 2012 Form 990 at Schedule H lines 7k(e), (f)).

ported $30.1 million in net community benefit expense representing 7.51% of its total expenses, which is *less* than it spent on community benefits when it apparently was still complying with ERISA.[12]

In fact, federal and state laws require all nonprofit, and most for-profit, hospitals to provide community benefits in various forms. Under 42 U.S.C. §1395dd, all hospitals receiving Medicare funds must treat emergency patients regardless of their ability to pay. To remain tax-exempt, nonprofit hospitals have long been required to provide community benefits. *See* IRS Rev. Rul. 69-545, 1969 WL 19168 (Jan. 1, 1969). The Affordable Care Act imposes additional obligations. 26 U.S.C. §501(r). Laws in many states, including New Jersey, require hospitals to serve all patients regardless of ability to pay and generally limit hospital charges and billing and collection practices.[13] New Jersey hospitals also receive partial reimbursement for charity care services through a Health Care Subsidy Fund. N.J. Stat. Ann. §26:2H-18.58. SPHS must provide these community benefits, and will continue

---

[12] *See* http://bit.ly/2cxRQg9 (Saint Peter's University Hospital 2014 Form 990 at Schedule H lines 7k(e), (f)).

[13] *See* N.J. Stat. Ann. §26:2H-12.52 (limiting the amounts that nonprofit and for-profit hospitals may charge uninsured state residents with family gross income of less than 500 percent of the federal poverty level); *id.* §26:2H-18.64 (prohibiting hospitals from denying admission or appropriate services based on a patient's ability to pay); N.J. Admin. Code §10:52-11.14 (prohibiting hospitals from billing for services or initiating collection procedures against persons determined to be eligible for charity care).

to receive charity care subsidies, regardless of the ERISA status of its pension plans.

3. Petitioners' other hyperbolic claims should be rejected. Petitioners argue that SPHS faces "more than $550 million in penalties" for just one year. Pet. 21. But ERISA penalties are authorized "in the court's discretion." 29 U.S.C. §1132(c)(3). Petitioners offer no example of such a massive penalty award in an ERISA case, and they presumably believe that it would be a clear abuse of discretion to award such a penalty here. In any event, petitioners' concerns are premature in this interlocutory posture.

Petitioners contend that ERISA would require SPHS "to revamp investment strategies to eliminate any religious or socially responsible investment criteria that might conflict with ERISA's prudent-investor standard." Pet. 19-20.[14] But ERISA's duty to act "solely in the interest of participants," 29 U.S.C. §1104(a)(1), does not prohibit screening morally objec-

---

[14] Interestingly, SPHS does not advance the argument advanced by petitioners in *Advocate* that ERISA status "could force some church-affiliated employers to abandon defined benefit plans in favor of defined contribution plans that shift investment risks from the employer to individual employees." *Advocate*, Pet. for a Writ of Cert. p. 20. Perhaps that is because, even though SPHS claims non-ERISA, church plan status for the defined-benefit Plan in this case, it nonetheless closed the Plan to new employees and replaced it with a defined contribution plan. *See* Compl. ¶¶61-62, C.A. App. A62.

tionable investments if (as is usually the case) available alternative investments are likely to perform on par with those that are screened out. *See* 29 C.F.R. §2509.2015-01 (2015).[15] Nor does it impose any *additional* burden on SPHS. SPHS's own Plan document, like most such documents, already incorporates essentially the same duty when it requires the plan to be managed "for the exclusive benefit" of plan participants. *See* C.A. App. A464 (SPHS Retirement Plan Restatement § 12.02).

III. PETITIONERS' PLAN IS NOT A "CHURCH PLAN"

For all the reasons given by the Third, Seventh, and Ninth Circuits, the terms of the statute make clear that a plan that is not established by a church is not an ERISA-exempt "church plan." Those courts correctly rejected petitioners' arguments to the contrary.

A. The Text and Legislative History Both Make Clear that a Church Plan Must Be "Established" by a Church

1.a. Petitioners argue that respondents' reading renders superfluous the use of the term "established" before "includes" in subsection 33(C)(i). Pet. 25. As discussed in the Brief in Opposition in *Advocate* (pp. 29), however, that argument is based on an incomplete quotation of the statute. As the Third, Seventh,

---

[15] *See* 80 Fed. Reg. 65135-01 (Oct. 26, 2015) (new Department of Labor bulletin superseding prior bulletin that had "unduly discouraged fiduciaries from considering ... environmental, social, and governance factors").

and Ninth Circuits all held, nothing about the structure or context of the language indicates the basic requirement that a church plan be established by a church has fallen by the wayside.

b. Petitioners now disavow (Pet. 27) a concession they made that illustrates the meaning of the statute here. The Third Circuit hypothesized a statute offering free insurance to a "person who is disabled and a veteran" and an amendment providing that "a person who is disabled and a veteran includes a person who served in the National Guard." Pet. App. 14a. The court inquired whether under those provisions a *non*-disabled ex-National Guardsman would be entitled to free insurance. Pet. App. 14a. Petitioners' counsel correctly answered no.[16]

Although counsel now say they have realized that the hypothetical is "irredeemably slanted," Pet. 27, it is in fact directly parallel to the statute at issue here. Just as Congress in the hypothetical likely viewed disability as essential to qualify for free insurance, Congress here viewed the church's establishment of the plan as essential for the exemption. After all, the exemption here is for "church plans," *not* "religious plans." A church that establishes a plan at least

---

[16] Petitioners contend that their counsel "explained that the church plan language was 'different.'" Pet. 27 (citation omitted). What counsel actually said was that the hypothetical was "*slightly* different" and then added that "I think the person has to be disabled, I think, obviously in that instance." Oral Argument at 12:46-58, Oct. 8, 2015, http://www2.ca3.uscourts.gov/oralargument/audio/15-1172KaplanvSaintPeter's.mp3 (emphasis added).

makes a promise to employees regarding their benefits, which creates a legal (and certainly a moral) obligation to keep that promise. To ensure that the exemption applies only to a church's plan, Congress provided that the church must "establish" the plan for its employees, even if another entity "maintains" it. No church or association of churches stands behind SPHS's Plan.

2. As explained in the *Advocate* Brief in Opposition (pp. 30-33), each of the courts of appeals have found that the legislative history is entirely clear that subsection 33(C)(i) was intended to correct only the "technical problem[]" that arose because "[t]he large majority of church plans of the congregational denominations are administered by a pension board, a unit separate from, but controlled by, the denomination." 124 Cong. Rec. 12,107 (1978) (statement of Rep. Conable). It does not reflect any intent to enact a broad new exemption for entities like SPHS operating in the commercial marketplace. The Third Circuit here engaged in a thorough canvass of the legislative history. *See* Pet. App. 18a-22a. It correctly concluded that, "despite a lengthy discussion of legislative history, [petitioners] ha[ve] not pointed to a single statement showing that Congress, in addition to being concerned about the sunset provision and plans maintained by pension boards (*i.e.*, church agencies), was also focused on plans *established* by those agencies." Pet. App. 22a.

B. The Only Constitutional Problem in this Case Would Arise if Petitioners' View of the Statute Prevailed

1. The court of appeals' decision does not create

any "constitutional doubts." Pet. 30. Far from providing an argument in favor of certiorari, the constitutional doubt doctrine counsels against further review in this case. As explained in the Brief in Opposition in *Advocate* (pp. 33-34), no court has suggested that petitioners' constitutional argument has merit, much less that it requires disregarding the clear meaning of the statute Congress enacted.

Petitioners argue that the court of appeals' decision will lead to a "morass," because it will be difficult to sort out whether entities establishing benefit plans qualified as "churches." Pet. 31. Petitioners cite as an example the Ninth Circuit's *Dignity* case, but in that case the district court had no trouble concluding that there was no genuine dispute of material fact that the healthcare system at issue established the plan and that the healthcare system was not a church. *Rollins v. Dignity Health*, 59 F. Supp. 3d 965, 974 (N.D. Cal. 2014).[17] On appeal, the Ninth Circuit considered and rejected petitioners' argument that distinguishing between churches and other religious organizations would result in government entanglement in religion, explaining that an inquiry into religious doctrine is "not require[d] ... and is not the inquiry that courts or agencies actually employ" in assessing whether an entity qualifies as a church. *Dignity*, 2016 WL 3997259, at *9 (citing *Found. of Human Understanding v.*

---

[17] The Ninth Circuit, on interlocutory appeal, declined to review the district court's rejection of defendants' argument that the plan was "co-established" by religious orders of sisters. *Dignity*, 2016 WL 3997259, at *10. Petitioners' claims about Dignity can be left to be addressed in the papers in that case.

United States, 614 F.3d 1383 (Fed. Cir. 2010); *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304 (D.D.C. 1980)). In any event, surely no "morass" is in sight here; SPHS "is not a church," Pet. App. 8a, 18a; *see* Pet. App. 43a, and it is undisputed that SPHS established the Plan at issue in this case.

2. The constitutional doubt doctrine would come into play in this case only if the Court accepted *petitioners'* view of the statute. This Court has recognized that "the government may (and sometimes must) accommodate religious practices." *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted). But it has also recognized that Congress may not act with no purpose other than simply "favoring ... religious adherents collectively over nonadherents," *Board of Education v. Grumet*, 512 U.S. 687, 696 (1994), especially if doing so would burden nonadherents, *Estate of Thornton v. Caldor*, 472 U.S. 703, 708-09 (1985).

As explained in the Brief in Opposition in *Advocate* (pp. 34-35), such a forbidden raw preference for religiously affiliated institutions is exactly what petitioners argue for here. The core purpose of the church-plan exemption was to avoid "examination of books and records" that "might be regarded as an unjustified invasion of the confidential relationship ... with regard to churches and their religious activities." S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. That purpose, however, could not justify an exemption for SPHS and similar institutions, since SPHS already participates in Medicare and Medicaid and issues tax exempt bonds, all

of which require it to disclose its financial records and relationships in great detail. *See* Compl. ¶55, C.A. App. A60. Moreover, granting ERISA exemptions to SPHS has an additional defect, because it imposes substantial costs on nonadherents, such as SPHS's employees and competitors. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *United States v. Lee*, 455 U.S. 252, 261 (1982). Far from creating constitutional doubt, the court of appeals' decision removes it.

3. The constitutional doubt doctrine provides an additional reason why this Court should deny certiorari. There is no basis for petitioners' constitutional-doubt argument. Nonetheless, granting certiorari in this case could easily require the Court to address the constitutional arguments advanced by one side or the other. In a case like this one that is in an interlocutory posture and in which there is no conflict in the circuits, prudence dictates that the Court should avoid a grant of review that could easily require an unnecessary constitutional determination.

IV. THIS CASE IS IN ANY EVENT A POOR VEHICLE

This case is in any event a poor vehicle, for two reasons. First, the SPHS Plan has been closed to new participants for six years, and its future status under ERISA is therefore a matter of dwindling importance to petitioners. Second, the SPHS Plan would not qualify as a church plan even if this Court were to grant review and accept petitioners' arguments on the question presented.

1. In 2010, SPHS closed the Plan to new employees and in 2012 announced that henceforth new employees would participate in a new, defined contribution plan. Compl. ¶¶61-62, C.A. App. A62. Indeed, with respect to that plan, SPHS apparently discovered that the national uniformity provided by ERISA was beneficial, because it operates that plan subject to ERISA. Compl. ¶62, C.A. App. A62.

The question here accordingly has dwindling importance to petitioners. The number and identities of the participants in the Plan is fixed. That number has no doubt declined in the years since 2010, and it will continue to do so in the future. For that reason, further review in this case is not warranted.

2. In addition, further review is not warranted here because, even aside from the "established by a church" requirement, there are two alternative and independent statutory requirements that SPHS could not satisfy. Failure to satisfy either would be sufficient to make the Plan ineligible for church-plan status.

a Subsection 33(C)(i) authorizes treatment as a church plan only for plans that are "maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits." 29 U.S.C. §1002(33)(C)(i). The Third Circuit had "substantial reservations over whether [SPHS] can even maintain an exempt plan." Pet. App. 17a n.8. Those reservations are well founded. The "principal purpose" requirement is aimed directly at pension boards of the sort discussed in the legislative record when

subsection 33(C)(i) was enacted, and it demonstrates Congress's intent to permit such pension boards to "maintain" church-established plans. However, the "principal purpose or function" of SPHS, which "maintain[s]" the Plan, is to provide health care and related services, not to administer or fund a plan for retirement benefits. Accordingly, the SPHS Plan would not qualify as a church plan, even if the "established by a church" requirement were disregarded. *See* Pet. App. 17a n.8; Br. Appellees pp. 53-55, *Kaplan v. Saint Peter's Healthcare Sys.* (3d Cir. May 4, 2015) (No. 15-1172).

b. The Plan does not satisfy the requirement in subsection 33(A) that a church plan be maintained "for" the "employees" of a church. *Id.* §1002(33)(A). Subsections 33(C)(ii)(II) and (iii) define employees of a church to include employees of organizations "controlled by or associated with" a church. SPHS is not a church and is neither controlled by nor associated with a church.

SPHS is not "controlled by" a church. Petitioners assert that SPHS is "owned and controlled by the Roman Catholic Diocese of Metuchen" and "[t]he Bishop of Metuchen is the sole member of Saint Peter's and appoints the President, CEO, CFO, and Secretary." Pet. 9. That assertion is contradicted by SPHS's sworn statements to the IRS, in which SPHS has consistently represented that it has no members, and specifically has no members capable of appointing a controlling majority of its governing board. C.A. App. A1033, A1095, A1149. Additionally, SPHS's Forms 990 consistently admit that "[c]ontrol of [its hospital] rests with its Board of Trustees[,] which is comprised

of independent civic leaders and other prominent members of the community[.]" C.A. App. A1056, A1113.

As for "associated with," petitioners' own cases, *Lown* and *Chronister*, establish that SPHS cannot meet that standard. SPHS does not receive funding from any church. Compl. ¶49, C.A. App. A60; *see also* C.A. App. A1613 ¶8, A1544-54; *see Lown*, 238 F.3d at 548 (hospital "'received no monies'" from church and imposed "no denominational requirement"). SPHS imposes no religious test on its employees, patients, or clients. Compl. ¶¶50, 53, C.A. App. A60; *see Lown*, 238 F.3d at 548 ("[N]o denominational requirement existed for anybody affiliated with Baptist Healthcare."). Petitioners argue that "Mass is said daily, ... daily morning prayers are broadcast over the public address system," and SPHS "provides healthcare services in accord with" guidelines promulgated by the U.S. Conference of Catholic Bishops. Pet. 9. But the Eighth Circuit in *Chronister* held that a hospital was not "associated with" a church, notwithstanding the fact that its "management [was] instructed to follow religious principles" and that "under Baptist doctrine, operating a facility for health care is part of the healing ministry of the church." 442 F.3d at 652-53.

3. For those reasons, SPHS's Plan would not be a church plan under ERISA, even if this Court held that a church plan need not be established by a church. Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KAREN L. HANDORF
Counsel of Record
MICHELLE C. YAU
COHEN MILSTEIN
SELLERS & TOLL PLLC
1100 New York Ave. NW,
Suite 500 East
Washington, DC 20005
(202) 408-4600
khandorf@cohenmilstein.com

JAMES A. FELDMAN
5335 Wisconsin Ave. NW,
Suite 440
Washington, DC 20015

LYNN LINCOLN SARKO
MATTHEW GEREND
KELLER ROHRBACK L.L.P.
1201 Third Ave.,
Suite 3200
Seattle, WA 98101
(206) 623-1900

RON KILGARD
KELLER ROHRBACK L.L.P.
3101 North Central Ave.,
Suite 1400
Phoenix, AZ 85012
(602) 248-0088

SEPTEMBER 16, 2016